



**Testimony on NH Supreme Court Chief Justice Nominee Gordon  
MacDonald  
Executive Council, June 26, 2019**

My name is Zandra Rice Hawkins and I am the Executive Director of Granite State Progress, a multi-issue advocacy organization working on issues of immediate state and local concern. I am here today to raise concerns and questions that our organization believes should be answered before the confirmation of Gordon MacDonald to the NH Supreme Court.

Setting aside Mr. MacDonald's lack of any experience as a judge and since we have no previous court decisions or approaches upon which to draw conclusions about his suitability for Chief Justice or Supreme Court judge, we must look at what we do know about Mr. MacDonald.

**Mr. MacDonald spent most of the last decade – 7 years – as a Board member and officer for the conservative think tank the Josiah Bartlett Center.** During that time, the Bartlett Center advocated in opposition of Affordable Care Act implementation, Medicaid expansion, RGGI and renewable energy projects, and in support of school privatization efforts, right to work, and significantly changing public pensions.

We'd encourage the Executive Council and public to ask Mr. MacDonald how his views on these subjects have impacted his work at the Attorney General of New Hampshire and how they might impact his decisions as a Supreme Court judge and chief justice.

**As Attorney General, MacDonald Reversed Office's Position on SB 193, School Voucher Bill Despite Clear Unconstitutionality**

For example, let's take the Attorney General's position on SB 193, a bill designed to divert public taxpayer dollars to private and religious schools in the form of school vouchers.

On April 4, 2017 and again on April 20, 2017 – immediately before MacDonald took over as Attorney General – the Attorney General's Office testified before the House Education Committee that “there are two provisions in the New Hampshire Constitution ... that say that tax dollars cannot be used in New Hampshire to support schools of sectarian organizations.”

However, on Dec. 28, 2017, the New Hampshire Attorney General's Office sent a two-sentence email to the New Hampshire Speaker of the House Representatives opining that, as drafted, SB193 was constitutional – even though it clearly was not. It read: “As discussed with Attorney General MacDonald this morning we believe that SB 193, with its proposed

amendment 2018-2530h, is constitutional. There are a few areas of the proposed amendment that could be enhanced and we are ready to provide technical assistance to the House.”

The NH ACLU and several editorial boards, including the Valley News and the Concord Monitor, questioned that judgement, citing that SB193 directly violated the NH Constitution and NH Supreme Court precedent restricting the use of public funds for religious schools. The criticism also noted that the email to the House Speaker was done outside of the normal avenue for legal opinions from the Attorney General’s office and was a reversal from the position the Attorney General’s office took just in the time period before MacDonald took office. ([InDepthNH, 1.2.18](#); Valley News, [1.16.18](#), Concord Monitor, [1.4.18](#))

The Concord Monitor editorial board wrote that the bill was clearly unconstitutional and added: “The state attorney general’s office, however, seems to be confused by the bill. Early in the bill’s history, Associate Attorney General Anne Edwards told the House Education Committee that, “We have to change our constitution if we want to have money – state, public money – going to religious schools.” Late last month, Edwards reversed course and said, after consulting with Attorney General Gordon MacDonald, that a revised form of the bill would be constitutional. It will be up to the state Supreme Court to decide which opinion is correct should the bill become law. State efforts to direct public funds to private schools, including religious schools, are being promoted nationally by school choice advocacy organizations.”

I will emphasize that the editorial at the time notes the critical role the State Supreme Court would play in this decision.

**Prior to the reversal from the AG’s office, MacDonald served on the Board of the Josiah Bartlett Center for Public Policy for 7 years; one of the Bartlett Center’s major campaigns has been advocating for school vouchers similar to those promoted in SB 193.** Granite State Progress has a video link for you today of Josiah Bartlett Center staff, at the time Gordon MacDonald was serving as Board secretary of the organization, testifying that the organization helped draft earlier variations of school voucher bills in New Hampshire and is active on the issue. ([Senate Education Committee, Testimony by Charlie Arlinghaus, Josiah Bartlett Center, March 28, 2013](#))

It does not appear that Mr. MacDonald recused himself from providing legal opinions on SB 193 in light of his board role with the Josiah Bartlett Center, nor the fact that he was still serving on the Board of the Bartlett Center right up until the time of his AG confirmation hearing – meaning that he was in a leadership capacity of the organization while it helped craft and promote SB 193 in the fall of 2016 and spring of 2017.

**Similarly, we are concerned about how MacDonald’s past work and affiliations may have influenced his decisions on which state coalition lawsuits to join or decline.**

**MacDonald did not join the federal lawsuit protecting the Affordable Care Act.** A coalition of 21 attorneys general filed an opening brief in Texas v. U.S., defending the Affordable Care Act (ACA) and the healthcare of tens of millions of Americans. We know that if the ACA were overturned, the results in New Hampshire would be grave –

- 89,000 Granite Staters would lose coverage, leading to a 136 percent increase in the uninsured rate;
- 572,000 Granite Staters with a pre-existing conditions, including 62,700 children, could be denied coverage for care; and
- 690,524 Granite Staters could once again have to pay for preventive care, like flu shots, cancer screenings, and contraception.
- Young adult coverage, Medicaid expansion, and other coverage options provided under the ACA would also be lost.

The Josiah Bartlett Center, under the years MacDonald served on the Board, actively opposed any implementation of the Affordable Care Act in New Hampshire. Given the grave and damaging impact overturning the ACA would have on our state's residents, why did the Attorney General not see it fit to protect health coverage for hundreds of thousands of Granite Staters?

**MacDonald also did not join the federal lawsuit protecting net neutrality.** Attorney Generals from 22 other states and the District of Columbia filed a protective petition to reverse the Federal Communications Commission repeal of net neutrality. The Josiah Bartlett Center's parent network has hosted events in opposition to net neutrality.

**MacDonald also did not join 44 other states in a lawsuit alleging generic drug manufacturers conspired to inflate prices; the case involves 20 pharmaceutical companies and 112 generic drugs for a large range of diseases.** The case is called "one of the most egregious and damaging price-fixing conspiracies in the history of the United States" and resulted in "many billions of dollars of overcharges to the Plaintiff States and others," according to the lawsuit. "The inflated prices of the generic drugs encompassed various types of drugs used to treat numerous diseases, including basic infections, diabetes, cancer, epilepsy, multiple sclerosis, HIV, ADHD and others." ([Denver Post, Colorado joins 43 other states in lawsuit alleging generic drug manufacturers conspired to inflate prices, 5.12.19](#))

In contrast, MacDonald's predecessor AG Joel Foster joined with 40 states in a similar lawsuit against (just) six generic drug makers for illegal bidding practices around two generic drugs. ([NH Attorney General's Office, News Release - NH Joins 40 States in Filing Generic Drug Antitrust Lawsuit Against Heritage Pharmaceuticals & 5 Additional Companies, 3.1.17](#))

This is concerning given that just weeks before MacDonald took over as the NH Attorney General, he was representing opioid manufacturer Purdue Pharma, the maker of the drug OxyContin. In that case, MacDonald actually argued that the NH AG's office should not be able to hire an outside firm to help sift through millions of pages of documents about whether the drug company deceived consumers about the addictiveness of their opioids. ([Concord Monitor, Representing Purdue Pharma, MacDonald argued against extra staffing at AG's office, 3.22.17](#))

**And, of course, MacDonald did not join the federal lawsuit challenging the constitutionality of the Trump Administration's new "domestic gag rule" altering the Title X family planning program.** A coalition of 21 State Attorneys General are working to

protect access to the only federal grant program that funds family planning programs to help patient's access contraception, cancer screenings, exams, and other related health services. New Hampshire stands to lose critical health access for women and their families if this gag order goes unchallenged, yet our state has not joined the lawsuit.

**In contrast, potential legal situations MacDonald has been active around include the Wayfair Ruling.** In fact, in October 2018 MacDonald even spoke on a panel at an event hosted by the Josiah Bartlett Center and others about the issue, stating: "If enforcement efforts do arise, we are going to look at them, and we are going to do what we can to protect and defend our fundamental state interests." ([NHPR, N.H. Looks to Take 'Aggressive' Position Following SCOTUS Wayfair Sales Tax Ruling, 10.24.18](#))

We only wish that MacDonald had been as eager to protect and defend our fundamental state interests around health coverage and access, drug price-fixing, net neutrality – an issue which is critically important to those in more rural parts of our state – and women's reproductive freedom.

### **MacDonald Has Questionable Record on Reproductive Rights**

**MacDonald's record and opinion on reproductive rights is among the most critical considerations for his potential role on the NH Supreme Court.** Across the country, the future of safe, legal abortion access is in jeopardy and we must make sure that our judicial nominees are clear about what is at stake and will protect our state's long-standing commitment to reproductive rights. It is very likely that the NH Supreme Court, particularly our Chief Justice, will have the final say on what reproductive rights are in New Hampshire for the next generation. The future of reproductive freedoms in our state may well depend upon this nominee.

MacDonald has declined public comment when asked by the media to outline his position on abortion rights. However, MacDonald's past activities around reproductive rights provide some idea of his approach to abortion access.

MacDonald was legislative director for anti-choice US Senator Gordon Humphrey during the time period in which Humphrey prime sponsored a number of anti-abortion bills, including the following:

- SJRES32 Constitutional Amendment - Declares that the right to life is the paramount and most fundamental right of a person. Defines "person" to include the unborn for the purpose of the right to life guarantee. (January 22, 1987)
- SJRES31 Constitutional Amendment - Declares that the right to life vests in a human being from the moment of fertilization. (January 22, 1987)
- S1242. President's Pro-Life Bill of 1987 - Prohibits the use of Federal funds for abortions, except when continuing the pregnancy would endanger the mother's life. Prohibits the granting of funds relating to certain population research and voluntary family programs under the Public Health Service Act to organizations providing

abortions or abortion referrals, unless the life of the mother would be endangered by continuing the pregnancy. (May 20, 1987)

- S264. Amends the Internal Revenue Code to deny status as a tax-exempt organization to any organization which performs, finances, or provides facilities for abortions (except where the life of the mother would be endangered). Denies the income, estate, and gift tax charitable contribution deductions for amounts contributed to such organizations. (January 6, 1987)
- S267. Amends the Legal Services Corporation Act to prohibit the use of Corporation funds for legal proceedings or litigation relating to abortions. (January 6, 1987)

For years, MacDonald represented the Diocese of Manchester, which opposes all abortions and most forms of contraception, and he was a delegate for anti-abortion politician and Presidential candidate U.S. Sen. Marco Rubio (R-Florida) during the 2016 Republican National Convention. All of these activities point to an individual likely to be hostile to women's reproductive freedom, and we urge the Executive Council to take this into serious consideration when forming an opinion about how MacDonald would approach any cases involving abortion or contraception, especially as we have no former judicial rulings from which to judge his impartiality and fairness, and he has chosen not to use the resources of the Attorney General's office to protect health access and reproductive rights.

### **In Closing: Questions for Gordon MacDonald**

#### **In conclusion, I ask you to consider the following questions:**

- Is it appropriate to appoint as Chief Justice someone who has no judicial experience?
- What was MacDonald's reason for his decision not to join the lawsuits around [the ACA, generic drug price fixing, net neutrality, domestic gag order, etc.]?
- Where does MacDonald stand on reproductive rights and privacy rights in general? Given his past Board role with the Josiah Bartlett Center –
- Does MacDonald believe that workers have a right to collectively bargain? What is his opinion on right to work legislation and “fair share” or “agency fee” agreements?
- Does MacDonald believe the state can fund or subsidize religious schools?
- Does MacDonald believe government has a role to play in health care access?
- In 2013, MacDonald was serving as the Bartlett Center board secretary when staff members lied in the media about the Bartlett Center receiving special interest funding from oil billionaire tycoons Koch brothers, at the same time the organization was pushing policies to protect oil companies. What steps did MacDonald take as a board member when his staff was caught in a public lie over Koch brothers funding of the Josiah Bartlett Center?\* What would he have done differently today?
- And since he has served on the Board of a Koch brothers funded organization and continued as Attorney General to participate in programs sponsored by that organization -- **has MacDonald also participated in any of the Koch brothers funded Mason Attorneys General Education Programs?**

These are important questions for the nominee to answer publicly, in addition to many of the other critical questions posed here today by others. Our organization very much looks forward to your efforts to do due diligence around this nomination and secure these answers before moving forward, and we are more than happy to provide additional documentation for anything referenced here today. Thank you.

Zandra Rice Hawkins  
Executive Director  
Granite State Progress  
(603) 225-2471  
[zandra@granitestateprogress.org](mailto:zandra@granitestateprogress.org)

\* In 2013, then-Bartlett Center President Charlie Arlinghaus told the Concord Monitor that the Josiah Bartlett Center does not receive any special interest funding from oil billionaire tycoons Koch brothers. The Monitor ran an op-ed from Granite State Progress after the organization provided documentation that the Bartlett Center does, indeed, receive funding from the Koch brothers.